2004

State of Utah v. John L. Legg, Jr. : Unknown

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Appellee/Respondent,	:	Case No. 20041035-CA
vs.	:	
JOHN L. LEGG Jr.,	:	
Appellant/Petitioner.	:	

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING

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QUESTION PRESENTED FOR REHEARING

Should this Court grant a petition for rehearing where petitioner where petitioner ask this Court to refind the facts to reach what he perceives to be a more favorable result or raises new issues for the first time in his petition for rehearing?

STATEMENT OF THE CASE

On November 30, 2003, petitioner was arrested for possession of a stolen vehicle and arson. R1. On December 9, 2003, petitioner signed a "Notice and Request for Disposition of Pending charges" (120-day disposition request), which referred to "arson and auto theft" charges, assertedly pending against him in Tooele County. R7. The 120-day notice was stamped, "received," on January 5, 2004. *Id.* The notice also bore a hand-written certification that indicated that the 120-day notice had been received on January 8, 2004. *Id.* The same day, the authorized agent who certified receipt of the 120-day disposition request

mailed it to the Tooele County Attorney's Office. R6. Six days later, on January 14, 2004, an information charging petitioner with theft by receiving stolen property (Count I) and arson (Count II) was filed in the Third District Court, Tooele County. R3-2.

Petitioner represented himself with standby counsel from approximately June 30 through November 3. R66, 271. On a number of dates during this period, petitioner unsuccessfully moved to dismiss the information with prejudice because he had not been tried within 120 days of either December 9, 2003 or January 5, 2004. R52-50, 54, 70-68, 93, 103-100, 112-109, 271:26-37, 40-41, 49-53, 58.

A jury convicted petitioner on both charges. R189. Petitioner was sentenced to a statutory one-to-fifteen-year term on his conviction for theft by receiving stolen property and to a statutory zero-to-five-year term on his conviction for arson. R225-222; 271:85.

On appeal, petitioner, represented by Alan Buividas, claimed that the trial court abused its discretion in refusing to dismiss the case under UTAH CODE ANN. § 77-29-1 (West 2004), the 120-day disposition statute. Aplt. Br. at 24. He also argued that even though his 120-day notice was filed prematurely his request should nevertheless have "kick[ed] in" when the information was ultimately filed because prison authorities breached their duty to inform him of the filing of the information under Utah Code Ann. § 77-29-2 (West 2004). Aplt. Br. at 24-29.[1]

This Court held that because petitioner prematurely filed his 120-day disposition

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[1] Petitioner also raised a number of sentencing issues on appeal. Aplt. Br. at 13-23. Petitioner does not claim in his petition that this court overlooked or misapprehended any of those issues.

request, the request had no legal effect. *State v. Legg*, 2006 UT App 367, at p.3. It also refused to consider petitioner's unpreserved argument under section 77-29-2 because petitioner failed to argue plain error or exceptional circumstances. *Id.*

ARGUMENT

WHERE PETITIONER ASKS THIS COURT TO REFIND THE FACTS ONLY IN ORDER TO REACH WHAT HE PERCEIVES AS A MORE FAVORABLE RESULT AND RAISES OTHER ISSUES FOR THE FIRST TIME IN HIS REHEARING PETITION, THIS COURT SHOULD DENY THE PETITION

A petition for rehearing is intended to focus the Court's attention on particular matters of fact and law that a petitioner believes the Court has either "overlooked or misapprehended." Utah R. App. P. 35(a). A petition should not be granted to review all matters ab initio, including arguments and authorities, that were previously considered by the Court in reaching its decision. *People v. Tidwell*, 12 P. 638, 639 (Utah 1887). Nor should a petition for rehearing be granted to consider matters that were not previously raised in the original hearing. *Western Securities Co. v. Silver King Consol. Mining Co. of Utah*, 192 P. 664, 675 (Utah 1920).

In this case, petitioner tries to do both. First, without any meaningful record support, he asks this Court to reconsider that Adult Probation and Parole should have informed him of any untried information against him under section § 77-29-2. Pet. at 6-7. The panel held that petitioner's argument was unpreserved in the trial court and therefore not amenable to review. Petitioner offers no authority or evidence to contradict this conclusion.

Second, a party cannot raise new legal points on appeal in petition for rehearing. *See*

Harrison v. Harker, 142 P. 716, 748 (Utah 1914). The rest of petitioner's claims were never presented to this Court on appeal, and therefore cannot be raised for the first time in a petition for rehearing.

1 - Claim of ineffective assistance of counsel. Petitioner claims that his appellate counsel, Mr. Buividas, was ineffective because he did not adequately present his motion to dismiss under Utah Code Ann. § 77-29-1 (West 2004) ("120-day disposition statute"). Pet at 5. Counsel's ineffectiveness was never before the panel on appeal. In any event, petitioner's assembled documents fail to advance his claim in any demonstrable way. *See* Pet. at Addendum D. Similarly, his claim—that his counsel was ineffective in "intentionally" not using documents in counsel's possession that would have shown that he was detained for forty-three days before criminal charges were filed, assertedly precluding an opportunity to answer the charges—was never presented to this Court on appeal. Pet. at 5-6.

2 - Equivalency of notice of parole violation to information. Petitioner seems to assert that a notice of a parole violation is equivalent to the filing of an information in determining the commencement of the 120-day disposition period. Pet. at 7. Apparently, in that connection, petitioner was misled by the filing of the warrant request and parole violation report, filed on December 2, 2003, into believing that he was timely filing an effective 120-day disposition request. Pet. at 9. This claim was never presented either to the trial court or to the panel on appeal. Moreover, petitioner cites to no authorities in support of his claim and those authorities relied on are irrelevant to the claim. Pet. at 8-9 (citing *Jones v. Board*, 2004 UT 53, ¶¶ 34-48, 94 P.2d 283 (discussing whether the Board of Pardons may issue a

retaking warrant for an alleged parole violator and whether full probable cause is necessary to detain a parolee); UTAH CODE ANN. ¶¶ 64-13-21, -28, -29 (West 2004) (providing for supervision of parolees, hearing spaces, and hearings to determine probable cause to detain parole violators, respectively; and UTAH CODE ANN. ¶¶ 77-30-1, -14, 15 (providing for definitions, warrantless arrest, and commitment pending arrest under warrant of governor, respectively, in extradition cases)).

3. Denial of preliminary hearing, excusable neglect, unlawful delay, and unconstitutionality of rule. Petitioner argues that he was either denied a timely preliminary hearing or that the information was not timely filed after his arrest (Issue 1, Pet. at 8), that a verbal authorization to detain him contributed to his failure to initially answer charges on which he was arrested (Issue 2, Pet. at 10), that the bringing of charges was unnecessarily delayed (Issue 3, Pet. at 11-12), and that Utah Administrative Code rule 671-504-1 (1997) (currently 671-515), providing for waiver of a parole revocation hearing, is unconstitutional (Issue 4, Pet. at 12-13). These issues were never presented to the panel on appeal.

CONCLUSION

For the reasons stated, this Court should deny the petition for rehearing..

RESPECTFULLY SUBMITTED this 17th day of November, 2006.

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Attorney General

KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Response in Opposition to Petition for Rehearing were mailed, postage prepaid, this 17th of November, 2006, to:

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